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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* WHEELING-PITTSBURGH STEEL CORPORATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Legislative History:

Miscellaneous:

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INTEREST OF AMICUS*

Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pittsburgh") is currently litigating issues with petitioner, the Pension Benefit Guaranty Corporation ("PBGC"), that parallel the issues presented in this case. *In re Wheeling-Pittsburgh Steel Corp.*, 103 Bankr. 672 (Bankr. W.D. Pa. 1989) (recommended opinion pending before district court). The *Wheeling-Pittsburgh* case involves the PBGC's

*Pursuant to Supreme Court Rule 36.2, Wheeling-Pittsburgh Steel Corporation is filing its brief as amicus curiae with the consent of all the parties. Copies of letters indicating that consent are being filed with the Clerk simultaneously with this brief.

assertion that it has authority under section 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1347, to restore terminated pension plans based on the subsequent implementation of new plans designed to ease the hardships of termination on pension recipients (commonly referred to as "follow-on" plans).[1]

Wheeling-Pittsburgh's plan terminations, formulation of follow-on plans, and institution of litigation against the PBGC occurred prior to the *LTV* case. As a result, Wheeling-Pittsburgh's plan terminations are governed by the version of section 4047 in effect prior to the Single Employer Pension Plan Amendments Act of 1986 ("SEPPAA"), Pub. L. No. 99-272, tit. XI, 100 Stat. 237, while LTV's terminations are governed by the post-SEPPAA provision. The language of the pre-SEPPAA provision, and other distinctions between *LTV* and *Wheeling-Pittsburgh*, make *Wheeling-Pittsburgh* a more difficult case for the PBGC than *LTV*. These more difficult issues are not directly before the Court because delay in the *Wheeling-Pittsburgh* litigation has allowed the *LTV* case to move ahead of *Wheeling-Pittsburgh*.

In their briefs to this Court, the PBGC and various amici have attempted to invoke Wheeling-Pittsburgh's plans as an example of

[1] The term "follow-on" plans was coined in the Termination Agreements negotiated between the PBGC and Wheeling-Pittsburgh in June 1986. After initial strenuous objections to any hardship payments to Wheeling-Pittsburgh's retirees, the PBGC agreed in these Termination Agreements to accept the termination of Wheeling-Pittsburgh's former defined benefit plans and to permit temporary follow-on arrangements in the form of voluntary employees' beneficiary associations ("VEBAs"). *See* 26 U.S.C. § 501(c)(9). These VEBAs provided payments supplemental to PBGC guarantees, equivalent to the payments proposed in Wheeling-Pittsburgh's permanent follow-on plans. Pursuant to the Termination Agreements, any permanent follow-on plan was subject to PBGC approval or to the determination of a federal district court that such follow-on plans are permissible under ERISA. The temporary VEBA arrangements remained in place until June 1989, when the district court granted injunctive relief, over the PBGC's objections, allowing Wheeling-Pittsburgh to implement its permanent follow-on plans pending resolution of its litigation with the PBGC.

the type of "abusive" follow-on plans that supposedly will proliferate unless the Court grants the PBGC the broad section 4047 powers it seeks. *See, e.g.*, Brief for the United States as Amicus Curiae at 16. The PBGC's and amici's suggestion that Wheeling-Pittsburgh followed LTV's example, and that other plan sponsors will follow suit, ignores the fact that the *Wheeling-Pittsburgh* matter arose prior to *LTV* and that the predicted proliferation of follow-on plans has not materialized.

Moreover, the PBGC and amici have failed to explain to this Court that, with full knowledge of both *Wheeling-Pittsburgh* and *LTV*, Congress rejected the PBGC's broad-based objections to follow-on plans. Congress addressed the PBGC's concerns not by banning follow-on plans designed to help the pension recipients that ERISA is intended to protect, but rather by assuring that terminations triggering the PBGC's insurance guarantees are limited to circumstances involving true financial need. By taking these steps, Congress precluded any use of ERISA's plan termination procedures as a ruse to "dump" liability on the PBGC. Thus, the very policy concerns cited by the PBGC in its backdoor attempt to establish judicially the authority it was denied by Congress have been resolved by legislative action.

The *Wheeling-Pittsburgh* case has been stayed by the district court pending this Court's consideration of *LTV*. Wheeling-Pittsburgh's interest in this case, therefore, is two-fold. First, it is imperative that the Court's opinion be informed by the full development of the follow-on plan issue, beginning with the pre-SEPPAA context in which the *Wheeling-Pittsburgh* case arose and culminating with Congress' rejection of the restoration authority sought by the PBGC. Second, the differences between the *LTV* and *Wheeling-Pittsburgh* cases should be clearly delineated, to preclude any inadvertent determination by this Court of the separate issues raised in *Wheeling-Pittsburgh*. The following description of the complete development and legislative history of the follow-on plan issue addresses both concerns.

SUMMARY OF ARGUMENT

The PBGC has attempted in this case to transform section 4047 of ERISA — a narrow provision empowering the PBGC to restore certain terminated plans when an employer's financial circumstances have improved — into a carte blanche to enforce its broad-based policy objections to follow-on plans. The United States Court of Appeals for the Second Circuit, affirming the district court, has held that section 4047 does not grant the PBGC such wide-ranging and essentially unreviewable authority. That decision should be affirmed.

The PBGC's opposition to follow-on plans undermines the bedrock principle underlying ERISA: that employees are entitled to rely on the pension promises of their employers. The language and legislative history of section 4047 do not constitute a license for the PBGC to frustrate this fundamental goal of ERISA. Nothing in ERISA prevents insolvent employers, forced to terminate their plans, from fulfilling that part of their pension promises not covered by PBGC guarantees.

As initially drafted, the text of section 4047 was limited to plans involuntarily terminated by the PBGC. The legislative history of section 4047 confirms that it was enacted for a narrow purpose: to allow the PBGC to reverse its prior involuntary termination decisions when the employer's or plan's financial circumstances have improved. Indeed, if Congress had intended section 4047 as a vehicle to address follow-on plans, it would have enacted a provision empowering the PBGC to deal with follow-on plans in routine, employer-initiated voluntary terminations. Thus, the language and legislative history of section 4047, as initially drafted, conflict with any notion that section 4047 empowers the PBGC to object to follow-on plans.

Although subsequent amendments extended authority to the PBGC to restore voluntarily terminated plans, Congress did not alter the touchstone of restoration authority — improvement in financial circumstances. Moreover, Congress' express rejection of anti-follow-on plan legislation underscores Congress' consistent policy

that the bailout of the PBGC should not be at the expense of retirees relying on promised pension benefits. The PBGC's bootstrap attempts to justify its deprivation of nonguaranteed retirement benefits as an inducement to maintain plans turns the title IV guarantee of pension benefits on its head.

Thus, the PBGC's exercise of restoration authority is clearly inconsistent with congressional intent. Under this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, it is for the courts and not the PBGC to determine congressional intent on the basis of the clear language and legislative history of section 4047. Based upon this language and legislative history, the Second Circuit's decision denying restoration of LTV's former defined benefit pension plans should be affirmed.

ARGUMENT

I.

THE PBGC'S FOLLOW-ON PLAN POLICY CONTRAVENES THE UNDERLYING PURPOSE OF ERISA: FULL PAYMENT OF PROMISED BENEFITS

As this Court has recognized, "[o]ne of Congress' central purposes in enacting [ERISA] was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980). According to the Court, "Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — he will actually receive it." *Id.* at 375.

A "major part of Congress' response to the problem" was the termination insurance program administered by the PBGC. *Id.* That program guarantees payment of vested benefits up to maximum limitations established by statute. *See* ERISA § 4022(b), 29 U.S.C.

§ 1322(b). However, ERISA's protection of the *full* benefit expectations of plan participants, many of whom rely heavily or exclusively on promised benefit income for sustenance in their later years, does not stop with PBGC guarantee payments. In recent years, the PBGC has successfully fought to establish the right of participants in terminated plans to seek payment from employers for vested plan benefits not covered by PBGC guarantees. ***See Murphy v. Heppenstall Co.***, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982).

In *Murphy*, the PBGC filed an amicus brief that echoes the position of Wheeling-Pittsburgh and LTV in this case:

> Title 29 U.S.C. § 1362 clearly limits the statutory liability owed by an employer to the PBGC for the pension benefits that are insured by Title IV of ERISA. ERISA, however, establishes only "***minimum standards*** for the regulation of private retirement systems . . . ." *Keller v. Graphic Systems of Akron*, 422 F. Supp. 1005, 1007 (N.D. Ohio 1976) (emphasis added). It does not impose a cap on the payment of other benefits. ***Consequently, an employer's agreement to provide greater benefits is not inconsistent with Title IV of ERISA.***

Brief for Amicus Curiae Pension Benefit Guaranty Corporation at 3, *Murphy v. Heppenstall Co.*, Nos. 80-1690, 80-1794 (3d Cir. 1980) (emphasis added). The court agreed, holding:

> ERISA established "minimum standards" for pension payments due retired employees. Congress endeavored to guarantee retirees at least a portion of the payments a terminated pension plan would have afforded. ***It is not inconsistent with the statutory scheme to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself.***

635 F.2d at 239 (emphasis added).

The PBGC's concern for full payment of promised benefits, however, has not carried over from *Murphy* to its evolving, ad hoc position concerning follow-on plans. In the *Wheeling-Pittsburgh* and

LTV cases, the PBGC has sought to avoid its insurance obligations by restoring (in *LTV*) or threatening to restore (in *Wheeling-Pittsburgh*) these companies' terminated plans.[2] Ironically, the PBGC has based this action on a determination that Wheeling-Pittsburgh's and LTV's follow-on plans come too close, in partnership with PBGC guarantee payments, to fulfilling these companies' pension promises. Fulfillment of pension promises, however, is the very purpose of the insurance system, as recognized by this Court in *Nachman*.

This disregard for the benefit promises made to retirees is not only inconsistent with the PBGC's position in *Murphy*, but also is not presaged from earlier expressions of agency policy. Prior to *Wheeling-Pittsburgh*, the only published PBGC determination concerning follow-on plans was a 1981 opinion letter. *See* PBGC Opinion Letter 81-11 (May 11, 1981), Petitioner's Appendix at 159a. However, that opinion letter dealt with the attempt of a *solvent* employer to terminate its defined benefit plans and immediately institute replacement defined benefit plans that, together with PBGC guarantee payments, replicated the prior plans.

Putting aside the propriety of the PBGC's interpretation of section 4047 in that opinion letter, which does not carry the force of law, PBGC Opinion Letter 87-7 (July 21, 1987), nothing in that letter could have put Wheeling-Pittsburgh or LTV on notice of the PBGC's subsequent policy positions. Opinion Letter 81-11 does not suggest that a follow-on plan implemented by an employer in financial distress, in the form of a defined contribution plan falling short of a complete makeup of prior benefits, could be considered an "abuse" of the insurance system. Nor did the PBGC's former policy

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[2] The PBGC also sought a legislative enactment to forbid employers from establishing follow-on plans within five years of terminating an underfunded plan. Initially adopted in committee, the PBGC's proposal was rejected by Congress as a whole in favor of other measures to foreclose the abuses predicted by the PBGC. These measures did not create the hardships for retirees that would be caused by banning follow-on plans. Congress' explicit policy choice provides further evidence of the conflict between the PBGC's position and the legislative intent the PBGC is bound to uphold. *See infra* pp. 22-25.

result in any deprivation of promised benefits, since the employer involved could afford full funding of its prior plans.[3]

Thus, the PBGC's policy against follow-on plans undermines the very purpose of ERISA because it *prevents* employers from making good on their promises to pay pension benefits. As is shown below, nothing in ERISA authorizes the PBGC to depart from this fundamental goal of ERISA. Congress' intent, which is the cornerstone of any judicial review of administrative action, is to allow employers in financial distress to terminate their plans, while simultaneously allowing measures to ensure, to the extent possible, that plan beneficiaries are not deprived of the vested benefits upon which they have relied for their retirement.

II.

THE PBGC'S AUTHORITY TO RESTORE TERMINATED PLANS IS SUBJECT TO JUDICIAL REVIEW

The asserted statutory authority for the PBGC's attempt to avoid payment of its insurance obligations is section 4047 of ERISA, 29 U.S.C. § 1347. Based on that section, which authorizes restoration of certain terminated pension plans,[4] the PBGC forces employers who must terminate their plans, if they are to survive, into an impossible predicament: either refrain from implementing follow-on plans that come close to making employees whole for promised benefits lost as a result of the termination,[5] or face restoration of the former plans these employers no longer can afford to fund.[6]

The PBGC argues that section 4047 must be read to give it authority that is, by its own description, "exceptionally broad." Brief for Petitioners at 20. Ignoring the provision as a whole, the PBGC argues that it is entitled under section 4047 to restore any terminated pension if *it* "determines such action to be appropriate and consistent with its duties under [title IV of ERISA]." In fact, the PBGC asserts that this grant of "exceptionally broad" authority is so apparent from the face of the statute that any resort to legislative history to determine Congress' true intent is unnecessary. *Id.*

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[3]Any application of the PBGC's position to terminations by insolvent employers would be contrary to the intent of Congress, expressed consistently since the enactment of ERISA in 1974. *See infra* note 14 (indicating that Congress' concern about abuses was limited to tranfers of liability by solvent employers, and addressing that concern not by authorizing plan restoration, but rather by making employers liable to the PBGC for plan underfunding up to specific net worth limitations). Moreover, in light of the ERISA provision requiring the PBGC to treat a plan amendment transforming a defined benefit plan into a defined contribution plan as a *per se* termination of the former plan, ERISA § 4041(e), 29 U.S.C. § 1341(e), Opinion Letter 81-11 gave no indication that the PBGC would consider a defined contribution plan to be a "continuation" of a former defined benefit plan.

[4]Upon the passage of SEPPAA, Congress expanded the scope of plan terminations to which section 4047 applies. *See infra* pp. 12-22.

[5]The PBGC suggests that some follow-on plans may fall far enough short of the goal of providing employees all of their promised benefits so as not to be "abusive." *See* Brief of Petitioners at 7. However, having failed to issue any regulations, guidelines, or other prospective guidance, the PBGC does not specify how much of the benefits promised to retirees must be denied before a plan passes muster under its test. The legislative proposal advocated by the PBGC concerning follow-on plans, *see supra* note 2; *infra* pp. 22-25, seems to indicate that, as long as retirees suffer the deprivation of nonguaranteed vested benefits for five years, the PBGC would have no objection to the implementation of identical makeup defined benefit plans in year six.

[6]Restoration clearly *is* appropriate if improved financial circumstances have made an employer capable of resuming funding, altering the prior justification for involuntarily terminating a plan, or voluntarily terminating a plan under the "distress" criteria added to ERISA by SEPPAA. *See infra* pp. 12-22. Because these considerations do not apply to Wheeling-Pittsburgh, which voluntarily terminated its plans prior to SEPPAA, and because Wheeling-Pittsburgh is not able to address LTV's financial ability to undertake full funding of its former plans, Wheeling-Pittsburgh does not address the PBGC's argument that an improvement in LTV's financial circumstances independently justifies its restoration action.

As this Court recognized in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the first step in reviewing any such claim to unfettered agency discretion is to employ "traditional tools of statutory construction" to determine whether the claim is consistent with an ascertainable congressional intention. *Id.* at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.[7]

The PBGC's superficial analysis of section 4047 hardly uncovers the intent of Congress. This Court has repeatedly recognized a "strong presumption that Congress intended judicial review of administrative action." *E.g., Traynor v. Turnage*, 108 S. Ct. 1372, 1378 (1988); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). This presumption in favor of judicial review may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Traynor*, 108 S. Ct. at 1378 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)).[8]

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[7]More recently, the Court applied this principle to invalidate an attempt by the Federal Reserve Board to extend its authority, similar to the PBGC's action in this case, through an expansive statutory interpretation contrary to clear indications of congressional intent. *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

[8]This rule of law serves the purpose, articulated in a recent article by Professor Cass Sunstein, of allowing courts to avoid statutory interpretations that lead to "irrational" outcomes, such as when "a statute might be understood as giving open-ended authority to a bureaucracy." Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 407, 439 (1989); *see also Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 646 (1980) (noting the need to avoid any statutory construction that would give an "open-ended grant" of power to an administrative agency). Such judicial review, according to Professor Sunstein, is especially important when the agency's self-interest is at stake, as the PBGC's pecuniary interests are in this case. As Professor Sunstein notes, "[b]road delegations of power to regulatory agencies have been allowed largely on the assumption that courts would be available to ensure fidelity to whatever statutory directives have been issued." *Id.* at

The PBGC's assertion that it has the exclusive power to determine when restoration is permissible is, in effect, a claim that courts have no authority to review the PBGC's decisions to determine if they were, in fact, "appropriate and consistent with [the PBGC's] duties under [title IV of ERISA]." Nothing cited by the PBGC, and nothing in the language or legislative history of section 4047, provides "clear and convincing" evidence that Congress intended to immunize the PBGC's restoration decisions from judicial review. If Congress had wished to make PBGC restoration decisions unreviewable by courts, it would have made that intent clear when it enacted section 4047.

Indeed, if section 4047 were so "exceptionally broad" as to give the PBGC exclusive, unreviewable authority to restore a plan whenever it determines that action to be "appropriate" and "consistent" with ERISA, that provision could not pass constitutional scrutiny under the nondelegation doctrine. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 408-09 (1928). As this Court confirmed just last Term, any attempt by Congress to grant authority to an administrative agency without providing an "intelligible principle" defining the scope of that authority would constitute an unconstitutional transfer of legislative duties to an unelected executive agency. *Mistretta v. United States*, 109 S. Ct. 647, 654 (1989); *see also American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 546-47 (1981) (Rehnquist, J., dissenting); *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 674-75 (1980) (Rehnquist, J., concurring).

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446 (citing *Crowell v. Benson*, 285 U.S. 22, 42-46 (1932)). To allow agencies "to decide the meaning of a law whose scope is so directly relevant to agency self-interest," such as a decision as to "whether agency jurisdiction extends to new or unforeseen areas," would be equivalent to allowing "foxes [to] guard henhouses." *Id.* Thus, in such circumstances, courts must act as "independent arbiter[s]" to determine the limitation of the agency authority in question. *Id.*

The usual contemporary application of the nondelegation doctrine is not to invalidate legislative enactments, but rather to adopt "narrow constructions of statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 109 S. Ct. at 655 n.7 (citing *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 646 (1980), and *National Cable Television Association, Inc. v. United States*, 415 U.S. 336, 342 (1974)). This principle applies with particular force to the PBGC's "exceptionally broad" reading of its restoration authority. Under the nondelegation doctrine, section 4047 must be interpreted by ascertaining the "intelligible principle" through which Congress intended to circumscribe the PBGC's authority. As the following discussion of the language and legislative history of section 4047 conclusively demonstrates, Congress' delegation of authority does not encompass the use of restoration as a weapon to prevent the implementation of follow-on plans.

III.

RESTORATION OF TERMINATED PLANS TO PROHIBIT IMPLEMENTATION OF FOLLOW-ON PLANS CONTRAVENES CONGRESSIONAL INTENT, AS REFLECTED IN THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 4047

A. As Enacted, Section 4047 Was Explicitly Limited to the Restoration of Involuntarily Terminated Plans, Consistent With Its Narrow Purpose of Addressing Changes in Financial Circumstances

Congress' intent with respect to section 4047, as originally enacted in 1974, is apparent from the plain language of that provision:

> When the corporation [*i.e.*, the PBGC] determines that *a plan which is to be terminated, or which is in the process of being terminated*, under this subtitle should not be terminated as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated. In the case of ***a plan which has been terminated under section 4042***, the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this title, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

ERISA § 4047, 29 U.S.C. § 1347 (1982) (emphasis added).

Pre-SEPPAA plan termination procedures, in effect from 1974 until 1986 (and thus governing Wheeling-Pittsburgh's, but not LTV's, plan terminations), gave employers the unilateral right to terminate their plans voluntarily under ERISA § 4041. *See PBGC v. Heppenstall Co.*, 633 F.2d 293, 296 (3d Cir. 1980). The PBGC was given no discretion to reject such voluntary terminations. *See id.* As long as employers were willing to suffer the financial consequences of such voluntary terminations — payment of up to 30 percent of their net worth to defray the cost of unfunded vested benefits, ERISA § 4062(b), 29 U.S.C. § 1362(b) (1982)[9] — they were free to terminate their plans.

By the same token, in the absence of any statutory authority to reject voluntary terminations *ab initio*, section 4047 gave the PBGC no authority to restore such voluntarily terminated plans. Rather, section 4047 applied only to "a plan which is to be terminated, or which is in the process of being terminated" (a description that could

[9]This provision was strengthened by Congress in SEPPAA and the Pension Protection Act of 1987 ("PPA"), Pub. L. No. 100-203, tit. IX, subtit. D, pt. II, subpt. B, 101 Stat. 1330-333, to increase the percentage ceiling on employer liability, and eventually to eliminate it altogether. *See* ERISA § 4062(b), 29 U.S.C. § 1362(b) (1982 & Supp. IV 1986) (post-SEPPAA provision); ERISA § 4062(b), 29 U.S.C. § 1362(b) (1988) (post-PPA provision); *infra* note 18.

not apply to a section 4041 termination at that time since the termination was accomplished through the mere filing of a notice) or "a plan which has been terminated under section 4042." *See* ERISA § 4047, 29 U.S.C. § 1347 (1982) (quoted above). The plain language of section 4047, therefore, limited the PBGC's restoration authority to only a small subset of plan terminations — those instituted involuntarily by the PBGC.

The PBGC's insistence that section 4047 is a broad statutory mandate to police the myriad of pension arrangements implemented subsequent to plan terminations cannot be squared with the limitations of this statutory language. Clearly, if Congress had intended section 4047 as a vehicle to implement the PBGC's follow-on plan policy, section 4047 would have included voluntary terminations from the very beginning, empowering the PBGC to deal with follow-on plans in routine employer-initiated terminations. The fact that Congress did not enact such an expansive provision is compelling evidence that the eradication of follow-on plans was not an intended goal of restoration under section 4047.

The PBGC seeks to avoid this result by distorting the pre-SEPPAA version of section 4047. The PBGC bases its argument on an unsupported assertion that, prior to SEPPAA, "section 4042 was the sole statutory vehicle for both voluntary and involuntary terminations of pension plans." Brief of Petitioners at 22 n.15. However, as the PBGC well knows, ERISA has always provided two mechanisms by which plans can be terminated — voluntary terminations initiated by employers under section 4041 of ERISA, 29 U.S.C. § 1341, and involuntary terminations initiated by the PBGC under section 4042, 29 U.S.C. § 1342. The fact that the pre-SEPPAA version of section 4041 referred to certain ministerial duties of the PBGC under section 4042, *see* ERISA § 4041(c), 29 U.S.C. § 1341(c) (1982), does not alter the fact that the decision as to *whether* to terminate a pension plan voluntarily belonged exclusively to the employer. *See PBGC v. Heppenstall Co.*, 633 F.2d 293, 296 (3d Cir. 1980). Indeed, if the PBGC were correct in its contention that a termination initiated by an employer under section 4041 is in fact a termination "under section 4042," it would render

the words "under section 4042" in the original version of section 4047 superfluous, contrary to "the elementary canon of construction" forbidding statutory interpretations that render words in a statute meaningless. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).[10]

If any further evidence of the limitation of section 4047 were needed, that evidence was unmistakably provided in the legislative history of ERISA. The key passage from that legislative history, which the PBGC quoted but did not fully analyze, underscores the limited ambit of the PBGC's restoration authority:

> Neither the House bill nor the Senate amendment had any specific provision that procedures against a plan in the termination phase might be abandoned by the corporation if the employer and plan enjoyed a favorable reversal of business trends, or if some other factor made termination no longer advisable.

[10]In the *Wheeling-Pittsburgh* case, the PBGC filed an answer to Wheeling-Pittsburgh's declaratory judgment complaint admitting that Wheeling-Pittsburgh's voluntarily terminated plans were terminated "under section 4041." *See* Answer, ¶ 32. Moreover, when it was to its advantage to do so, the PBGC successfully argued before the United States Court of Appeals for the Third Circuit that a voluntary termination under the pre-SEPPAA version of ERISA occurs "under section 4041." *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 199 (3d Cir. 1983). That case involved a dispute as to the termination date for an underfunded plan. If the voluntary termination were considered to be pursuant to section 4041, one mechanism for determining the termination date applied, while a different mechanism applied if termination were considered to be pursuant to section 4042. The court agreed with the PBGC that the voluntary termination occurred pursuant to section 4041, holding that "[w]hile section [4041] requires that PBGC 'commence proceedings in accordance with the provisions of section [4042]' when the sufficiency of the [voluntarily terminated] plan's assets are in doubt, *this directive does not change the character of the termination itself.*" *Id.* at 203 (emphasis added). Having "successfully and unequivocally asserted a position in a prior proceeding" the PBGC should not be allowed to maintain an inconsistent position in this case. *Edwards v. Aetna Life Insurance Co.*, 690 F.2d 595, 598 (6th Cir. 1982).

> Under the conference substitute, the corporation may cease any termination activities and do what it can to restore the plan to its former status. As a result, a terminated plan being operated by a trustee as a wasting trust may be restored if, during the period of its operation by the trustee, experience gains or increased funding make it sufficiently solvent. The corporation may, when appropriate, transfer to the employer or plan administrator part or all of the remaining assets and liabilities.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58, *and in* 3 ERISA Legislative History 4277, 4645-46 (1976) (quoted in Brief for Petitioners at 22). This explanation indicates, consistent with the language of section 4047, that Congress' concern was limited to "procedures *against* a plan in the termination phase" (i.e. involuntary terminations). The fear expressed by Congress was that, without a provision such as section 4047, the PBGC might decide to exercise its discretion to institute involuntary termination proceedings against a plan, and subsequently discover that a change in financial circumstances had made that termination "no longer advisable."

The PBGC relies on the Conference Committee's reference to "some other factor" as an open-ended invitation to restore terminated plans for any other reason the PBGC can ascertain. Brief of Petitioners at 22. The context of the Committee's statement, however, indicates that this could not have been the intent of Congress. Rather, the only reasonable interpretation of the reference to "some other factor" is that improvements in an employer's or plan's financial circumstances could arise from factors other than "a favorable reversal of business trends." For example, if a plan's fortunes improved as a result of investment experience providing assets sufficient to fund vested benefits under the plan, the PBGC would have authority to restore the plan. However, the touchstone of the PBGC's discretion to determine that its initial involuntary termination decision is "no longer advisable" remains the financial condition of the employer and the plan.

Thus, the original language of section 4047 provided the PBGC with restoration authority only with respect to plans it originally decided to terminate. Congress' explanation of section 4047 indicates that the purpose of this provision, thus limited, was to give the PBGC a chance to change its mind if the adverse financial circumstances prompting its initial action had improved. Therefore, absent an improvement in a plan's or plan sponsor's financial circumstances, the PBGC's reliance on section 4047 to enforce its broad-based policy against follow-on plans derives no support from the language or legislative history of that provision.

B. As Amended by SEPPAA, Section 4047 Did Not Extend Authority To Restore Plans in Retaliation for the Implementation of Follow-on Plans

Unlike Wheeling-Pittsburgh, LTV's plan terminations are governed by the provisions of ERISA, including section 4047, that were amended by the enactment of SEPPAA in 1986.[11] In SEPPAA, Congress altered the procedures governing plan terminations under ERISA. Most significantly, Congress replaced the former section 4041, which allowed employers to terminate their plans voluntarily "simply by filing a notice," *see supra* pp. 13-14, with a procedure requiring employers terminating underfunded plans to demonstrate compliance with certain "distress criteria." ERISA § 4041, 29

[11] This difference in applicable law, which is particularly significant because Wheeling-Pittsburgh's plans (unlike LTV's) were voluntarily terminated and thus not subject to restoration under the pre-SEPPAA version of section 4047, is not the only distinction between the *LTV* and *Wheeling-Pittsburgh* cases. For example, the PBGC has recognized that Wheeling-Pittsburgh's follow-on plans are defined contribution plans. As such, the payments to retirees under these plans are subject to risks of performance by Wheeling-Pittsburgh, investment of plan assets, and other variables. In addition, the issue of financial improvement, asserted by the PBGC as a separate basis for restoration in *LTV*, is not present in the *Wheeling-Pittsburgh* case. To the extent these distinctions may affect the Court's analysis, Wheeling-Pittsburgh respectfully requests that the Court make explicit the limitations of its holding.

U.S.C. § 1341 (1982 & Supp IV 1986). By limiting the right to terminate underfunded plans to cases of demonstrated financial need, Congress ensured that termination is the option of last resort. Moreover, by giving the PBGC authority to determine, under this new procedure, when an employer had sufficiently demonstrated financial distress, Congress for the first time gave the PBGC discretion with respect to acceptance of terminations it did not initiate under section 4042.

In light of this new grant of discretion, Congress also made a conforming amendment to the restoration authority granted to the PBGC under section 4047. Because a change in circumstances could affect the PBGC's exercise of discretion with respect to a termination under the newly-defined "distress" criteria just as easily as it could affect an involuntary termination, Congress amended section 4047 to allow the PBGC to take restoration action with respect to a plan "which has been terminated under *section 4041 or* section 4042." ERISA § 4047, 29 U.S.C. § 1347 (emphasis added).

However, although SEPPAA expanded the universe of terminated plans as to which the PBGC could exercise its restoration authority, the legislative history of SEPPAA confirms that this amendment did not expand the substantive grounds supporting such an exercise. To the contrary, Congress intended only to preclude employers who could afford their plans from transferring liabilities to the PBGC. At the same time, Congress preserved the right of employers in financial distress to terminate their plans, while simultaneously taking steps to recognize and to provide for the benefit needs of their employees and retirees.

The House Committee on Education and Labor, for example, explained the purpose of SEPPAA as follows:

> Most of the claims against the insurance program have been associated with business failures. However, a significant portion of claims has come from ongoing companies . . . . *The Committee believes that the law should be revised to prevent claims against the insurance program from ongoing companies that are financially able to fund the guaranteed benefits in their plans*. . . .

H.R. Rep. No. 241, part 2, 99th Cong., 1st Sess. 28 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 686 (emphasis added). Similarly, the Senate Committee on Labor and Human Resources explained:

> The essential reform accomplished by this package is a narrowing of the "funnel" into the Pension Benefit Guaranty Corporation (PBGC). Under the terms of this bill *plan sponsors that demonstrate distress* (a "distress" termination) *will still be permitted to transfer their plan liabilities to the PBGC*. . . .

S. Rep. No. 146, 99th Cong., 1st Sess. 451 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News at 42, 410 (emphasis added).[12]

These Committees also reaffirmed Congress' continued commitment to ensuring, "whenever possible, that participants and beneficiaries receive all benefits under the terms of the plan." H.R. Rep. 241, part 2, 99th Cong., 1st Sess. 28 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 686. With this in mind, Congress enacted legislation whose "basic policy . . . is to limit the ability of plan sponsors to shift liability for guaranteed benefits onto

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[12]The Committee also stated: "For those plan sponsors that, of necessity, undergo a "distress termination," the provisions of this bill grant the PBGC an enhanced ability to recover the asset insufficiency that is 'dumped' on the system. . . . Taken *in toto*, these provisions will enable the PBGC to recover more than current law permits against those fewer plan sponsors that are permitted to dump on the insurance system." S. Rep. No. 146, 99th Cong., 1st Sess. 451 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 42, 410. This increase in employer liability to the PBGC, in addition to the restriction of voluntary terminations to cases of "financial distress," was another means by which Congress sought to ensure that abuses of the system were avoided while at the same time preserving the right of employers experiencing extreme economic difficulties to terminate their plans notwithstanding the continuation of their businesses. *See infra* note 18.

other PBGC premium payers and to avoid responsibility for the payment of certain nonguaranteed benefits to cases of severe business hardship." *Id.*[13] It would be inimical to this full payment principle, *see supra* pp. 5-8, to allow the PBGC to prevent employers from taking measures, on their own, to ensure that plan participants receive their promised benefits.

Thus, the only relevant restoration inquiry for the PBGC remains whether the plan's or employer's circumstances have improved to the point that the employer is now "financially able to fund the guaranteed benefits in [its] plans." *Id.* Congress sanctioned the reversal of a previous termination decision only when the prior finding of financial "distress" is no longer warranted.[14]

[13]In furtherance of this continued commitment to full payment of all benefit promises, including those not covered by PBGC guarantees, Congress added a new provision in SEPPAA to increase the safeguards against loss of nonguaranteed benefits. Under this provision, the PBGC must appoint a trustee for payment of these excess benefits. The employer is liable to this trustee, in addition to its liability to the PBGC for asset insufficiency. ERISA § 4062(c), 29 U.S.C. § 1362(c). The purpose of this provision, according to the legislative history, "is to ensure that the contributing sponsors and members of their controlled groups do not evade responsibility for paying benefits which have been earned by participants and beneficiaries, but which are not guaranteed by the PBGC or otherwise paid by the plan." H.R. Rep. No. 300, 99th Cong., 1st Sess. 301 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 756, 952. The PBGC's opposition to follow-on plans undermines the very objective — employer responsibility for the difference between PBGC guarantee payments and benefit promises — that Congress attempted to achieve through this provision.

[14]The legislative history of ERISA, as originally enacted, also reflects Congress' concern about "abuses" of the insurance system, and the limitation of that concern to solvent employers. At that time, Congress responded to this concern by enacting a provision that made plan sponsors liable to the PBGC, up to 30 percent of net worth, upon termination of their plans. In explaining this provision, Senator Harrison Williams, the original Senate sponsor of ERISA, stated:

> Since there would be a possibility of abuse *by solvent employers* who terminate a plan and shift the financial burden to the insurance program, ***notwithstanding their own financial ability to continue funding the plan***, the conference bill imposes liability on employers whose plans terminate, to reimburse the program for benefi.. paid by the corporation. This liability extends to 30 percent of the employer's net worth.

120 Cong. Rec. S15737 (daily ed. Aug. 22, 1974) (statement of Sen. Williams), *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5185 (emphasis added). In SEPPAA and the PPA, Congress progressively tightened this provision to increase, and eventually to eliminate, the net worth limitation on the PBGC's recovery. ERISA § 4062(b), 29 U.S.C. § 1362(b); *see also supra* note 12. Nothing in this or any other amendment to ERISA, however, indicates that Congress changed its view and determined that terminations by employers in true financial distress could be "abusive."

The PBGC ignores this extensive legislative history, and instead focuses on a single sentence from a floor statement by Senator Don Nickles that allegedly supports the PBGC's follow-on plan policy. However, the PBGC omits the context of this quotation:

> I expect that the Corporation will block . . . abuses of the new termination rules under title IV by using its authority under section 4047 to negate pending or completed plan terminations and restore plans to their pretermination status. ***Specifically, the Corporation may negate terminations under section 4041(c) or section 4042 whenever the Corporation determines that a principal purpose of an act, failure to act or transaction undertaken by the contributing sponsor — or any member of its controlled group — was to enable such person to satisfy any of the distress criteria in section 4041(c)(2)(B) or to compel the Corporation to institute termination proceedings under section 4042, thereby decreasing the liability to the PBGC or avoiding the obligation to provide all benefit commitments under the plan.***

132 Cong. Rec. 4887 (statement of Sen. Nickles) (emphasis added).

Senator Nickles' stated concern was that a financially healthy company, not otherwise able to meet the tests for financial "distress," would abuse the insurance system by taking steps to circumvent the financial distress standards, thereby avoiding "the obligation to provide all benefit commitments under the plan." *Id.* Senator Nickles' statement thus reinforces the overall policy behind SEP-

PAA — that termination insurance should be limited to cases of genuine financial distress. There is no suggestion, however, that Senator Nickles equated "abuse" with the implementation of follow-on plans by employers in genuine financial distress. To the contrary, Senator Nickles' concern with providing "all benefit commitments under the plan" reaffirms Congress' commitment to the fundamental full payment principle of ERISA, which the PBGC's policy undermines.[15]

C. The PBGC's Policy Against Follow-on Plans Has Been Rejected by the Explicit Action of Congress

In the absence of any explicit or implicit legislative authority to interfere with follow-on plans implemented by employers in finan-

[15]If any further confirmation of Congress' intent were needed, it was provided less than a year after Congress' enactment of SEPPAA, in the legislative history accompanying the PPA. During consideration of a proposal banning implementation of follow-on plans within five years after termination of an underfunded plan, *see infra* pp. 22-25, the House Ways and Means Committee provided the following description of "present law":

> *Replacement Plans*. Under present law, an ongoing entity can continue in operation on a profit-making basis after transferring liability to the PBGC and without being liable for the amounts paid by the PBGC to plan participants. Similarly, *an employer, after terminating a plan in a distress termination, may continue or attempt to establish a plan that provides retirement benefits to employees. Such a plan may be designed to provide the same benefits as the terminated plan less the benefits paid by the PBGC*. The committee does not believe that the pension insurance system was intended to permit employers to shift liability of ongoing retirement programs to the PBGC. Similarly, the PBGC should not be liable for an employer's pension responsibilities if the employer is able to continue to provide retirement benefits.

H.R. Rep. No. 391, 100th Cong., 1st Sess. 1010, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1, 2313-627 (emphasis added). In light of the Conference Committee's deletion of the proposed replacement plans provision, the "present law" described by the Ways and Means Committee, which is consistent with prior congressional explanations, continues to govern the scope of plan termination authority in general and the PBGC's restoration authority in particular.

cial distress, the PBGC turned to Congress for yet another amendment. Congress' rejection of that proposal emphatically demonstrates that the PBGC's objection to follow-on plans contradicts Congress' intent, and therefore cannot be justified as "appropriate and consistent with [the PBGC's] duties under [title IV of ERISA]."

The amendment advocated by the PBGC would have precluded the establishment of follow-on plans providing "substantially similar benefits" within five years of terminating an underfunded plan.[16] Such a provision was included in the initial version of the PPA produced by the House Ways and Means Committee, which was enacted by the House of Representatives. H.R. 3545, 100th Cong., 1st Sess., § 9532(e), *reprinted in* 133 Cong. Rec. H9185, H9325 (daily ed. Oct. 29, 1987).[17]

[16]The Ways and Means Committee was asked to consider legislation under which, "[e]xcept to the extent permitted by the PBGC, an employer (and its controlled group) would be precluded from establishing retirement programs which, in whole or in part, provide substantially similar benefits within five years after termination of a plan that did not have adequate assets to provide PBGC guaranteed benefits." *The Administration's Proposal on the Funding and Termination of Defined Benefit Pension Plans* at 18 (Feb. 1987).

[17]The House version would have added a new subsection (e) to section 4062 of ERISA, 29 U.S.C. § 1362, providing:

> PROHIBITION OF FUTURE BENEFITS WHERE ALL LIABILITIES TO CORPORATION NOT SATISFIED. —
>
> (1) IN GENERAL. — Except to the extent permitted by the [PBGC], if a single-employer plan is terminated with unfunded guaranteed benefits and all liabilities with respect to such termination under subsection (b) are not satisfied, it shall be unlawful for any person described in subsection (a), at any time during the period described in paragraph (3) —
>
> (A) to establish an arrangement under which retirement benefits are provided, or
>
> (B) to provide for further accruals of retirement benefits under any arrangement previously established.
>
> For purposes of the preceding sentence, the term "arrangement" shall not include any multiemployer plan.
>
> (2) AUTHORITY TO ENJOIN VIOLATION. — The

The Senate version of the PPA, however, did not include any provision forbidding follow-on plans. Instead, the Senate version continued to strengthen the restrictions limiting pension insurance to cases of genuine financial need, while at the same time ensuring that participants in terminated plans are not required to suffer unnecessary deprivations of promised benefits.[18] Congress enacted the Senate version of the PPA, and rejected the House version, which would have given the PBGC authority to implement the very policy it seeks to vindicate in this case. *See* H.R. Conf. Rep. No.

[PBGC] may bring an action to enjoin any violation of paragraph (1). Subsection (c) of section 4070 shall apply to any such action in the same manner as if such action were brought under section 4070.

(3) PERIOD DURING [WHICH] PROHIBITION APPLIES. — The period described in this paragraph is —

(A) the 5-year period beginning on the termination date, and

(B) to the extent provided in regulations, the 1-year period ending on the termination date.

[18]Congress enacted numerous changes in SEPPAA and the PPA in response to the PBGC's concerns about potential abuses of the insurance system. *See, e.g.*, ERISA § 4041, 29 U.S.C. § 1341 (amended in SEPPAA and the PPA to limit employers' rights to terminate plans voluntarily to cases in which "financial distress" can be demonstrated to the PBGC); ERISA § 4062(b), 29 U.S.C. § 1362(b) (amended in SEPPAA and the PPA to increase, and eventually to eliminate, the net worth limitation on employers' liability to the PBGC for termination of an underfunded plan); ERISA §§ 307, 4068, 29 U.S.C. §§ 1085b, 1368 (added and amended in SEPPAA and the PPA to tighten the security and lien rules applicable to underfunded plans, thus improving the position and priority of the PBGC's claims in bankruptcy proceedings); ERISA § 4006, 29 U.S.C. § 1306 (amended in SEPPAA and the PPA to grant significant premium increases to the PBGC to assure its ability to meet guarantee commitments arising from plan terminations triggered by financial distress). The cumulative effect of these revisions has been to foreclose the possibility of "gaming the system," used by the PBGC to justify its opposition to follow-on plans.

495, 100th Cong., 1st Sess. 885, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1631.[19]

Thus, the policy determination advanced by the PBGC for its attempted application of section 4047 has been rejected by the explicit action of Congress. The PBGC's attempt to circumvent that policy choice through the back door of section 4047 should not be upheld by this Court.

D. The PBGC's Justifications for Its Follow-on Policy Cannot Be Reconciled With Congressional Intent

In the face of this defeat in Congress, the PBGC seeks to rationalize its follow-on policy in two ways. First, the PBGC argues that the floodgates of termination would open if follow-on plans were allowed because the alleged "coinsurance" feature of the termination system would be removed. Second, the PBGC, which apparently views itself as guardian of "competitive balance" in the steel industry, argues that this balance would be upset if some bankrupt employers are permitted to terminate their plans and implement follow-on plans while other solvent employers do not follow suit. Brief of Petitioners at 28-30; *see also* Brief of Amici Armco, *et al.*

Of course, neither of these rationales is supported in the legislative history as a potential ground for a restoration decision.[20] Moreover,

[19]Although the PBGC attempts to dismiss this determination as mere congressional "inaction," *see* Brief of Petitioners at 24-25, it was much more than that. The proposal did not merely die in committee for reasons that cannot be ascertained. The Conference Committee was presented with a stark choice between two policy alternatives, and it rejected the alternative advocated by the PBGC and passed by the House of Representatives.

[20]The "coinsurance" policy is not a concept articulated by Congress, but rather is the invention of a PBGC employee. R. Ippolito, *The Economics of Pension Insurance* 21-22 (1989) (cited in Brief of Petitioners at 28). The legislative history relied upon by the PBGC to support this notion says nothing about discouraging plan terminations; it merely states that "there is an advantage in not fully covering all pension benefits in that this encourages those receiving larger benefits, and who are often in a

even if these policy concerns were relevant to restoration, they could not be reconciled with the policies established by Congress in enacting ERISA, which the PBGC is bound to uphold.

The PBGC's "coinsurance" notion, suggesting that unions and affected employees lack incentives to oppose plan terminations if follow-on plans are implemented, is divorced from economic and labor relations realities. Indeed, as the Brief for the United States as Amicus Curiae mentions, Wheeling-Pittsburgh suffered through a lengthy strike by the United Steelworkers of America when the pension issue first arose. Brief of United States as Amicus Curiae at 8.[21] In the years preceding the strike at Wheeling-Pittsburgh, and Wheeling-Pittsburgh's bankruptcy, the union already had accepted substantial wage and benefit reductions as concessions to help Wheeling-Pittsburgh through its economic difficulties. When Wheeling-Pittsburgh nonetheless was forced into Chapter 11 bankruptcy, it soon became apparent that the company would not be able to continue as a viable entity unless it achieved further reductions in labor costs. Termination of its former plans was one such step necessary to ensure the company's survival.

management position, to see to it that there is adequate funding of the pension plan." S. Rep. No. 383, 93d Cong., 2d Sess. 81, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4965 (cited in Brief of Petitioners at 28). Under the rules in effect at that time, a plan could be terminated just as easily with or without adequate funding; however, the shortfalls in insurance coverage gave the management employees who likely have input into the termination decision an incentive to push for adequate funding to cover their excess benefits if a termination does take place.

The competitive balance concern, moreover, is completely beyond the scope of the PBGC's mission as indicated by congressional intent. Congress did not create the PBGC to police the steel industry marketplace, or to carry out any other functions remotely related to economic regulation. The PBGC was created to administer the pension insurance system within the statutory authority given to it by Congress. *See* ERISA § 4002(a), 29 U.S.C. § 1302(a) (defining the purpose of the PBGC).

[21] The Brief of the United States erroneously attributes the strike to termination of Wheeling-Pittsburgh's plans. In fact, the plans were not terminated until after the strike was settled. The strike was triggered by Wheeling-Pittsburgh's demand for reductions in labor costs necessary to allow it to reorganize and continue as a viable entity.

The union did not easily accept the concessions required to save the company. The length and bitterness of the strike in which it engaged are proof of the union's resolve. Nonetheless, economic realities ultimately forced the union to accept termination of the plans, with certain measures to ease the hardship of that decision on union employees. In settling for these measures, the union had to satisfy itself with follow-on plans that are defined contribution plans (providing only payments from whatever assets are available from promised contributions) instead of its former defined benefit plans (promising specific benefits regardless of the cost of funding). Moreover, the union gave up other features of its former plans, such as disability and plant shutdown benefits. In light of these concessions, forced by unavoidable economic circumstances, it cannot reasonably be said that the union and Wheeling-Pittsburgh's employees did not suffer as a result of the plan terminations. *See generally* Brief of the United Steelworkers of America as Amicus Curiae.

The PBGC's concerns about competitive balance in the steel industry similarly lack any basis in reality. As amici Armco, *et al.* are well aware, the days of "pattern bargaining," in which steel companies negotiated labor agreements in lock step with one another and any single more favorable term in a collective bargaining agreement could be said to give that company a competitive advantage over the others, have long since passed. *See* J. Strohmeyer, *Crisis in Bethlehem: Big Steel's Struggle To Survive* 223 (1986) (quoting Lynn R. Williams, president of the United Steelworkers of America: "We don't see a pattern being set for an industry on the basis of a bankrupt participant . . . there are no level playing fields in this industry."). Although the PBGC and amici have asserted an economic advantage for Wheeling-Pittsburgh and LTV by looking at pension costs in isolation (an advantage that would be greater, not lesser, if Wheeling-Pittsburgh and LTV had not made the outlays necessary to fund follow-on plans), the extent to which the plan terminations have affected the competitive balance between Wheeling-Pittsburgh and LTV and their competitors is wholly speculative.

In any event, to the extent these terminations did have an effect on competition, that effect is a product of the termination system as Congress intended it to operate. Congress did not provide that a company must go out of business to terminate its plans. Rather, a company that can demonstrate financial distress can "dump [its liabilities] on the insurance system," S. Rep. No. 146, 99th Cong., 1st Sess. 451 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 42, 410; *see supra* note 12, and proceed with its attempts to reorganize and continue its business. Congress, in providing for this system (and, indeed, in allowing companies to reorganize under Chapter 11 bankruptcy), determined that the interest in preserving companies experiencing economic hardship, and in protecting the livelihood of employees and others who depend on these companies for their survival, justifies certain protections that are not extended to competitors in the marketplace. As much as those competitors would like to destroy these protections (at least until they find themselves in the same situation), the PBGC is not empowered to overturn the policy determinations of Congress.

The PBGC's asserted grounds for restoration, therefore, cannot be considered "appropriate and consistent with [the PBGC's] duties under [title IV of ERISA]," as informed by the expressed intent of Congress. Congress' extensive explanations of ERISA repeatedly confirm that implementation of follow-on plans by insolvent employers to assure that retirees, to the extent possible, receive the benefits they were promised is not only not an "abuse" of the insurance system, but in fact furthers the goal of full satisfaction of benefit commitments that Congress envisioned when it enacted ERISA. The PBGC is allowed to restore a terminated plan only when it finds that its former determination that the employer is not able to fund its plan is no longer valid because of improvement in the terminated plan's or the employer's financial circumstances. Absent such an improvement, the PBGC is not authorized to use restoration to implement policy determinations that Congress has rejected.

CONCLUSION

The PBGC must not be allowed, through an "exceptionally broad" interpretation of section 4047, to accomplish a result that contravenes the purposes of ERISA and the intent of Congress. ERISA's purpose of protecting *all* the benefit expectations of plan participants would be defeated by a policy that would prevent insolvent employers from taking whatever measures they can afford to make up the benefit losses suffered by their employees as a result of plan terminations.

Congress has taken measures to prevent "abuses" of the system by solvent employers, but has refused to preclude implementation of follow-on plans by insolvent employers. Its explanation of that policy choice clearly indicates that follow-on plans implemented by employers in true financial distress do not constitute "abuses" of the system. The PBGC's attempted use of restoration to compel insolvent employers to refrain from implementing follow-on plans to ease the hardships suffered by their retirees, therefore, cannot be reconciled with the expressed intent of Congress.

Respectfully submitted,

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